



REPUBLIC OF KENYA



KENYA LAW
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**Wachenje v Standard Chartered Bank Kenya Ltd (Civil Application
E051 of 2022) [2023] KECA 941 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 941 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E051 OF 2022
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

BIGVAI MWAILEMI WACHENJE APPLICANT

AND

STANDARD CHARTERED BANK KENYA LTD RESPONDENT

*(Being an application to strike out the notice of appeal dated filed by
the respondent against a judgement delivered on 17th June 2022 by
Hon Justice B. Ongaya in the ELRC in ELRC Cause No E664 of 2020)*

RULING

1. Before us is a Notice of Motion dated August 11, 2022 taken out by the Applicant, Bigvai Mwailemi Wachenje, against the Respondent, Standard Chartered Bank Kenya Ltd seeking that the Respondent's Notice of Appeal dated and lodged in the Employment & Labour Relations Court Mombasa in ELRC No E664 of 2020, on July 29, 2022 by the Respondent be struck out. It further seeks that any appeal that may be filed pursuant to that Notice of Appeal, if filed before the application is heard, be struck out as being incompetent. There is also the usual prayer for provision for costs.
2. The basis upon which the application is brought, according to the supporting affidavit sworn by the Applicant, Bigvai Mwailemi Wachenje, on August 11, 2022, is that the judgement sought to be appealed from was delivered by the Court below on June 17, 2022 and that under the Rules of this Court, 2010 edition, the Respondent should have filed the Notice of Appeal within 14 days by July 4, 2022 but failed to do so. Following an application dated July 28, 2022 made in the Superior Court, the Respondent obtained leave to file an appeal out of time on July 29, 2022.
3. It is however contended by the Applicant that such an application ought to have been made under Rule 4 of the *Rules* of this Court and that the purported leave granted to the Respondent by the Court below is a nullity as the same was given by a Court that lacked the jurisdiction to grant the extension



- of time. Accordingly, it was averred that the Notice of Appeal filed by the Respondent was filed out of time and without leave of the Court.
4. In response to the application, the Respondent filed a replying affidavit sworn by Lorraine Adoli Oyombe, the Respondent's Relations Manager on December 22, 2022. The gist of the said affidavit was that after the delivery of the judgement on June 17, 2022, the copy of the judgement was not readily available to counsel for the Respondent until July 7, 2022, when the Respondent's counsel obtained a copy thereof and shared it with the Respondent. Though the Respondent was aggrieved by the judgement, by that date, the 14 days period limited for lodging the Notice of Appeal had lapsed. Accordingly, counsel for the Respondent filed the application dated July 28, 2022 pursuant to Section 7 of the [Appellate Jurisdiction Act](#) seeking leave to file its Notice of Appeal out of time as the Respondent could not exclude the time required to prepare to furnish the proceedings, having not requested for the same within the prescribed time.
 5. It was averred that upon considering the application, by a consent order made on July 29, 2022, the Superior Court allowed the said application and granted the Respondent leave to file its Notice of Appeal out of time on condition that the decretal sum is deposited in a joint interest earning account, a condition which the Respondent complied with and the Notice of Appeal was lodged in the Superior Court on July 29, 2022 and the letter bespeaking typed proceedings lodged on August 4, 2022 and duly served. According to the Respondent, the inability by the Deputy Registrar of the Superior Court to complete the typing of the proceedings and furnish the same to the Respondent is what has delayed the Respondent in filing the Record of Appeal.
 6. It was the Respondent's case that the orders sought herein cannot issue in light of the provisions of Section 7 of the [Appellate Jurisdiction Act](#).
 7. This application was argued before us on this Court's virtual platform on 29th March, 2023 during which Learned Counsel, Mr Wachenje, appeared for the Applicant while Ms Faustine Osewe, appeared for the Respondent. Both counsel relied on their written submissions which they highlighted.
 8. The gist of this application as highlighted by Mr Wachenje is that the ELRC as no jurisdiction to extend the time limited for the filing of the Notice of Appeal since Section 7 of the [Appellate Jurisdiction Act](#), under which the said Court purported to have acted, restricts such power to the High Court. It was submitted that the application for extension of time ought to have been made before this Court under rule 4 of the Rules of this Court. Since the ELRC lacked the jurisdiction to extend time, it was submitted that the Notice of Appeal lodged pursuant to the said decision is a nullity hence the same was filed out of time without leave of the Court. It was in any event pointed out, orally before us, that 7 months have lapsed since the Notice of Appeal was failed and that it was only after this application was filed that an application for extension of time was made. It was further pointed out that there was no letter seeking for proceedings hence no material has been presented to show the steps that have been taken by the Respondent towards the prosecution of the appeal. It was the Applicant's position that he has been prejudiced by the delay.
 9. On behalf of the Respondent it was submitted that under Section 7 of the [Appellate Jurisdiction Act](#), the High Court, which now in light of the [Constitution of Kenya, 2010](#) needs to be construed as including the Environment and Land Court and the Employment and Labour Relations Court, has jurisdiction to extend time for giving notice of intention to appeal from a judgement of the Superior Court. According to the Respondent, this jurisdiction is further confirmed under rule 41 of the [Court of Appeal Rules](#). It was noted that the term "Superior Court" is defined under rule 2 of the [Court of Appeal Rules](#) to mean a court from which an appeal lies to the Court of Appeal hence in this case where the Superior Court is the Employment and Labour Relations Court, that Court has jurisdiction to



extend time. It was further noted that since the application before the Superior Court was allowed by consent, the Applicant cannot be allowed to approbate and probate at the same time.

10. In the Respondent's view, this application is an afterthought and is designed to frustrate the hearing of the appeal against the erroneous decision of the Superior Court. We were urged to dismiss the application with costs.

Analysis And Determination

11. We have considered the application, the affidavits, both in support of and in opposition to the Motion, the submissions made and the authorities relied upon.
12. The Motion before us is expressed to be brought under Rule 44 of the *Court of Appeal Rules*. Rule 44, both in the 2010 and the 2022 editions of this Court's *Rules*, does not provide for the striking out of the Notice of Appeal. That rule, in the 2010 edition, deals with applications for leave to amend while in the 2022 edition it provides for the form of applications to Court. To our mind, the provision that provides for the striking out of a Notice of Appeal, which is what is being sought in this application is Rule 84 of the 2010 *Rules* (now Rule 86 of the 2022 *Rules*). That rule provides that:

A person affected by an appeal may, at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground—

- a. that no appeal lies; or
- b. that some essential step in the proceedings has not been taken or has not been taken within the prescribed time:

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days after the date of service of the notice of appeal or record of appeal, as the case may be.

13. In this case, it is contended that the said Notice of Appeal lodged was filed pursuant to an order issued by a Court that had no jurisdiction to do so and hence a nullity. That is not the scenario contemplated by the above rule. Strictly speaking therefore, the application before us does not fall under the legal provision that permits the striking out of the Notice of Appeal.
14. Apart from that, what the Applicant seeks, though indirectly, is that we should, under the guise of determining an application for striking out the Notice of Appeal, overturn the decision made by the Superior Court granting leave to appeal out of time, an order which the Applicant does not contest was granted by consent. Omolo, JA in *Safaricom Limited v Ocean View Beach Hotel Limited and two others* Civil Application No 327 of 2009 [2010] eKLR explained in very simple terms the jurisdiction of this Court thus:

“...the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgement of the notice of appeal the Court of Appeal would have no business to meddle in the decision of the High Court.”

15. We do not have either an appeal or a notice of intention to appeal against the decision by the Superior Court extending time to the Applicant to file the Notice of Appeal or granting leave to appeal out of time. In the absence of such a Notice we have no jurisdiction to meddle in that decision under any guise. In light of the conclusion we have reached and as there is no appeal before us challenging that decision,



we do not find it necessary, in this ruling, to deal with the issue whether the Employment and Labour Relations Court has the jurisdiction, under Section 7 of the [Appellate Jurisdiction Act](#), to extend time.

16. Regarding the failure to lodge the Record of Appeal, that relief was not sought in the application before us. Instead, Mr Wachenje raised the issue during highlighting of submissions. With due respect, we do not find that submission serious enough to warrant us making a substantive order.
17. All in all, we find no merit in the Notice of Motion dated August 11, 2022 which we hereby dismiss with costs.
18. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

S. GATEMBU KAIRU, FCIarb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed.

DEPUTY REGISTRAR

